In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-461

JOHN A. MENDELL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on June 29, 1971. A petition for rehearing was denied on August 30, 1971. The petition for a writ of certiorari was filed on September 30, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the evidence was sufficient to prove venue.

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2. Whether the trial court improperly admitted hearsay testimony.

3. Whether the evidence was sufficient to prove possession of heroin.

STATEMENT

After a trial without a jury in the United States District Court for the Northern District of Illinois, petitioner was convicted of violating 21 U.S.C. (1964 ed.) 174, by dealing in unlawfully imported heroin. He was sentenced to a prison term of five years. The court of appeals affirmed (Pet. App. A).

1. The facts adduced at trial show that on August 7, 1968, John J. Gallagher, a Special Agent for the Bureau of Narcotics and Dangerous Drugs, met with one Robert French in the vicinity of 4105 West North Avenue in Chicago (Tr. 15–16[1]). French told Gallagher that "the people" were waiting around the corner with a sample of heroin. While Gallagher waited in his car, French left to obtain the sample (Tr. 18). Federal agents who were driving north on Pulaski Avenue approaching North Avenue, observed French and petitioner walking side by side on Pulaski Avenue. Both men stopped, and petitioner took from his shirt an object which he handed to French (Tr. 78–80). French returned to Gallagher's automobile and handed him a small container of heroin hydrochloride for which Gallagher paid $100 (Tr. 19, 25–26).

French again left to consult his "people" (Tr. 26). He was observed talking to petitioner at the corner of

[1] "Tr." refers to the transcript of the trial proceedings.

Keystone and LeMoyne (Tr. 81). He then rejoined Gallagher and told him "the people" refused to get the heroin without $300. After a telephone call, Gallagher drove to the vicinity of LeMoyne and Pulaski where he gave French $300 in $50 bills (Tr. 27–28). French walked to the corner of Keystone and LeMoyne where he met petitioner. He was observed handing something to petitioner who placed it in his left pants pocket. Petitioner walked to his automobile and quickly drove away (Tr. 82–84). French returned to Gallagher and told him that "Johnny" had gone to get the heroin. French said that Johnny was a reliable source who could provide up to 20 to 30 ounces of heroin at a time (Tr. 28–29).

French and Gallagher remained together until about 10:15 that evening. During that time French left Gallagher several times to enter 1502 North Pulaski Avenue. At 10:30 Gallagher walked to the corner of LeMoyne and Pulaski where he observed French in conversation with petitioner (Tr. 29). Petitioner handed an object to French who placed it in his right pants pocket (Tr. 30). French joined Gallagher and gave him a piece of newspaper which contained a plastic-wrapped package containing 12.515 grams of heroin hydrochloride (Tr. 30–31, 36–37). Gallagher gave French $600 with the admonition that the package was light. French said that if there were any complaints he could be reached at his house at 1502 North Pulaski (Tr. 38).

Shortly thereafter, Agent Edward Nolan overheard French and petitioner conversing in a hot dog stand

on the corner of Pulaski and Grand Avenue. French asked petitioner why it took so long to get the stuff and petitioner answered that he had to go to Blue Island (Tr. 159–161). Petitioner told French that he could handle all he wanted from here on. They agreed that in the future payment should be made in small bills (Tr. 161–163).

On August 29, 1968, Agent Gallagher telephoned French at a room in the Holiday Inn Hotel which was registered to petitioner (Tr. 13–14, 48–49). French told Gallagher that 3½ ounces of heroin which he had ordered would arrive that night or the following day. The next day, Gallagher met French at the White Castle Restaurant on Elston and Addison. At that time French weighed a quantity of heroin and gave it to Gallagher in exchange for $3,000 (Tr. 49–51). French was seen shortly afterwards driving to the Holiday Inn in the vicinity of Lawrence and Marine Drive. Twenty minutes after French entered the hotel, petitioner, accompanied by a passenger, drove away in the same automobile (Tr. 111–114).

ARGUMENT

1. Petitioner's contention that the Government failed to prove the venue of the crime because none of its witnesses specifically referred to the city of Chicago or the County of Cook is fully answered by the court of appeals' opinion below, upon which we rely. As the courts below held, venue is established where testimony justifies the reasonable inference that the violation occurred at the place alleged in the indictment. *United States* v. *Budge*, 359 F. 2d 732 (C.A.

7); *United States* v. *Chiarelli*, 192 F. 2d 528 (C.A. 7), certiorari denied, 342 U.S. 913. As the court of appeals found, "The record is replete with testimony identifying streets, intersections, * * * and parks. Both in volume and distinctiveness, this evidence was tantamount to a testimonial declaration that the acts took place in Chicago." (Pet. App. 2–3). The decision below is not in conflict with the Tenth Circuit's decision in *Jenkins* v. *United States*, 392 F. 2d 303, in which the court held that the evidence was insufficient to establish venue in Kansas for the crime of receiving and possessing stolen property where the defendant had been acquitted of theft charges in Kansas and there was no other evidence to show venue. The court in *Jenkins* expressed its adherence to the rule of *United States* v. *Budge*, *supra*, that venue may be shown by circumstantial evidence (see 392 F. 2d at 305).

2. Petitioner contends that the trial court improperly considered hearsay testimony when it allowed Agent Gallagher to testify as to statements made to him by French referring to "Johnny" as his source of supply. As the court below ruled, such statements were admissible under the exception to the hearsay rule that declarations made in furtherance of a joint venture are admissible against the other partners in crime. See *United States* v. *Jones*, 438 F. 2d 461, 466 (C.A. 7); *United States* v. *Rinaldi*, 393 F. 2d 97 (C.A. 2), certiorari denied, 393 U.S. 913. The independent evidence of petitioner's meetings, conversations, and transfer of objects to French was sufficient to show the existence of a joint undertaking. The decision of

the Ninth Circuit on which petitioner relies—*Ong Way Jong* v. *United States*, 245 F. 2d 392 (C.A. 9), and *Cass* v. *United States*, 361 F. 2d 409 (C.A. 9)—hold only that there was insufficient independent evidence of a joint venture. Later decisions in the Ninth Circuit make clear that statements by one joint venturer in furtherance of the enterprise are admissible against all who participate in the enterprise even in the absence of a conspiracy charge, provided there is sufficient independent evidence of concert of action. *United States* v. *Williams*, 435 F. 2d 642 (C.A. 9); *Kay* v. *United States*, 421 F. 2d 1007 (C.A. 9); see also *Robinson* v. *United States*, 33 F. 2d 238 (C.A. 9).

3. Petitioners' attack on the sufficiency of the evidence is without merit as is apparent in the record and as demonstrated in the opinion of the court of appeals (Pet. App. 5–7). The cases cited by petitioner were decided on different facts and do not conflict in principle with the decision below.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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